

**ORIGINAL**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
1998 Biennial Regulatory Review )  
Petition for Section 11 Biennial Review )  
filed by SBC Communications, Inc., )  
Southwestern Bell Telephone Company, )  
Pacific Bell, and Nevada Bell )

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

CC Docket No. 98-177

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**COMMENTS OF  
HYPERION TELECOMMUNICATIONS, INC.**

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Hyperion Telecommunicaitons, Inc. ("Hyperion"), respectfully submits the following comments in response to the Commission's *NPRM* issued in the above-captioned proceeding.<sup>1</sup> Hyperion is a leading provider of integrated local telecommunications services over state-of-the-art fiber optic networks in selected markets in the United States. Hyperion operates in 20 geographic markets serving 46 cities, including more than 5,463 route miles of fiber and 17 Lucent 5ESS switches in 11 states. Hyperion has bought or secured an additional 8,100 route miles of fiber optics which it expects to use in 50 new markets in the Eastern United States to operate an advanced regional fiber network.

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<sup>1</sup> 1998 Biennial Regulatory Review -- Petition for Section 11 Biennial Review, Notice of Proposed Rulemaking, CC Docket No. 98-177, FCC 98-238, released November 24, 1998 ("*NPRM*").

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The *NPRM* solicited comment on a number of proposals offered in SBC's Petition for Section 11 Biennial Review.<sup>2</sup> SBC's forbearance petition sought to obtain a nearly complete deregulation of incumbent local exchange carriers ("LECs"). As such, the petition was grossly premature in that incumbent LECs continue to possess the overwhelming share of the local service market,<sup>3</sup> possess market power, and require continued application of economic and rate regulation to their provision of telecommunications services. SBC's petition also sought to short-circuit many Commission proceedings that are carefully considering various regulatory areas by requesting that the Commission immediately grant by means of biennial review its desired result in those proceedings. Hyperion applauds the Commission's decision to offer for comment a far smaller set of issues than set forth in SBC's "wish list." Hyperion will confine its initial comments at this time to SBC's request for detariffing of special access and dedicated transport services.

#### **I. FORBEARANCE HAS NOT BEEN JUSTIFIED UNDER THE STATUTORY STANDARD**

Hyperion submits that essentially complete deregulation of incumbent LECs' provision of interstate special access and transport services that SBC seeks through detariffing could not be

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<sup>2</sup> Petition for Section 11 Biennial Review filed by SBC Communications, Inc. May 8, 1999.

<sup>3</sup> Collectively, CLECs captured 5.1% of the business market for local telecommunications services in 1997. *United States Competitive Local Markets*, Strategis Group (1998). In 1996 the CAP/CLEC share of nationwide local service revenues, including local exchange and access services, was 1%. Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data (rel. Nov. 1997).

justified under the standard for forbearance under Section 10(a) of the Communications Act.<sup>4</sup>

Under that standard, the Commission must determine, *inter alia*, that tariffing is not necessary to assure that rates are just and reasonable, and that forbearance would serve the public interest.<sup>5</sup>

SBC's petition presents no more than generalized allegations that the markets for these services are sufficiently competitive to permit reliance on competition instead of regulation to assure that rates are reasonable. To the extent it submits any data, it fails to explain how its figures were obtained and how it measured competition. Thus, it states, for example, that in Dallas it has lost 43% of the high capacity market but does not explain or support this estimate or how it defines "high capacity." Hyperion is concerned that SBC has used measures and comparisons that do not realistically measure the extent of competition for special access and transport services. Thus, nothing in the present record could support a conclusion that the markets for special access and dedicated transport are sufficiently competitive to permit reliance on market forces instead of regulation to assure that prices are reasonable.

Moreover, SBC apparently is seeking deregulation of special access and transport service throughout its service areas. While there is more competition for high capacity services in some large urban markets, that could not constitute sufficient justification for the broad geographic deregulation SBC seeks. Accordingly, regardless of the extent of competition in urban areas, the Commission could not conclude, as requested, that tariffing of high capacity services is not necessary at all to assure the prices for those services are just and reasonable.

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<sup>4</sup> 47 U.S.C. Sec. 160(a).

<sup>5</sup> *Id.*

In addition, the Commission cannot determine that forbearance from applying tariffing obligations to incumbent LEC provision of high capacity service would serve the public interest. In the absence of sufficient competition to constrain prices, tariffing is necessary to assure that prices are reasonable. Moreover, SBC has failed to provide any assurance that it would not use forbearance as an opportunity to raise prices in markets where there is less competition to make up for rate reductions it makes in response to competition in more competitive areas. Hyperion submits that this pricing freedom would harm competition by providing incumbent LECs with the ability to engage in anticompetitive pricing strategies.

## **II A THRESHOLD REQUIREMENT FOR FORBEARANCE SHOULD BE COMPLIANCE WITH THE KEY MARKET OPENING PROVISIONS OF THE ACT**

In the *Access Reform NPRM*,<sup>6</sup> the Commission proposed that the initial stages of pricing flexibility would be premised on incumbent LECs having complied with key market opening requirements so that barriers to competition would have been removed. SBC's petition for forbearance does not apparently envision any obligation on its part to demonstrate that it has opened its local service markets to competition prior to obtaining the sweeping pricing flexibility and deregulation it seeks.

Hyperion believes that a minimum precondition to any pricing flexibility must be a demonstration by incumbent LECs that they have fully complied with some objective measures of compliance with the key market opening requirements of the Act. Absent such compliance,

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<sup>6</sup> *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, Notice of Proposed Rulemaking, CC Docket Nos 96-262, 94-1, 91-213, and 95-72, 11 FCC Rcd 21354, para. 161 (1996) ("Access Reform NPRM").

there can be no genuine assurance that competition can exist to any significant degree and therefore, that competition, instead of regulation, can effectively constrain incumbent LEC prices.

### III. CONCLUSION

For these reasons, Hyperion urges the Commission do deny SBC's request for forbearance from application of tariffing requirements to incumbent LECs' provision of special access and dedicated transport services.

Respectfully submitted,



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Dated: January 11, 1999

Counsel for Hyperion Telecommunications,  
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I, Ivonne J. Diaz, hereby certify that on this 11th day of January 1999, copies of Comments of Hyperion Telecommunications, Inc. were hand delivered to the following:

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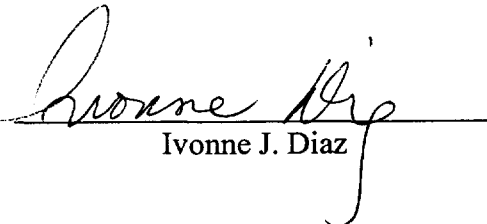
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